REME COURT, U. S.

Office - Supreme Court, U.S.
FILED
DEC 23 1969
JOHN F. DAVIS, CLERK

No. 365

In the Supreme Court of the United States

OCTOBER TERM, 1969

HUN CHAK SUN, A/K/A/ JACK SUN, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
WILLI WILSON,
Assistant Attorney General,
JEROME M. FEIT,
CONSTANCE S. ROTAN,
Attorneys,
Department of Justice,
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 865

HUN CHAK SUN, A/K/A/JACK SUN, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 415 F. 2d 791.

JURISDICTION

The judgment of the court of appeals was entered August 27, 1969. The petition for a writ of certiorari was filed November 19, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 245 of the Immigration and Nationality Act, as amended: 8 U.S.C. 1255, provides in pertinent part:

> (a) The status of an alien, other than an alien crewman, who was inspected and ad-

372-348—69

> mitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is approved.

* * * * *

QUESTION PRESENTED

Whether in the circumstances of this case the Board of Immigration Appeals abused its discretion under Section 245 of the Immigration and Nationality Act in denying petitioner's application for adjustment of status to that of an alien admitted for permanent residence.

STATEMENT

Petitioner, a 40-year-old native and citizen of the Republic of China, was, in 1953, employed in Taiwan by the Ministry of Communications of the National Security Bureau of the Republic of China (R. 249–250). In 1956 the Bureau gave him permission to go to the United States for two years to study radio engineering (R. 250, 255–256, 293, 301). On August 18, 1956, petitioner entered the United States as a non-immigrant for this training purpose (R. 243, 295–297, 343–345). The Bureau thereafter advanced sums of money to petitioner for tuition, travel and living expenses, and also paid his salary to his wife, who was living in Formosa with their two children. (R. 287–288,

318, 361–362). In September 1957, petitioner discontinued his training status without informing the Chinese government or the Bureau of his action and secured employment in San Francisco as an engineer with a private firm, the California Color Corporation. (R. 243, 299, 343–345). The following year, 1958, petitioner requested the Bureau to extend his stay in the United States for an additional year so that he could complete his studies in radio engineering (R. 300, 302). His request was granted. Petitioner, however, took no courses in radio engineering, but rather took courses which would assist him in his work with California Color Corporation.

In July 1960, although he had no intention of returning to Taiwan and had not taken courses in radio engineering, petitioner wrote to the Bureau that his studies would terminate in August and that he would return to Taiwan in September 1960 (R. 312–314). As a consequence, he obtained $500.00 from the Bureau for traveling expenses (R. 313–314, 361). He did not return to Taiwan.

Petitioner applied for adjustment of status to permanent resident in November 1962 (R. 243). Upon being notified of this application, the Consul General of China informed the district director of the Immigration Service that petitioner had contracted to go to the United States for training, and thereafter to return to Taiwan; that transportation, fees, salary and dependents' allowance had been paid to him since his departure from Taiwan; and that the Chinese Government had concluded that petitioner, as an incumbent official of the Government, had committed a breach

of contract and fraud. The Consul General requested that petitioner's application for permanent residence be denied and that he be deported back to Taiwan (R. 361–362). The Department of State expressed the view, based on diplomatic communications, that petitioner's application should be denied on the grounds that approval would have a harmful effect upon relations between the Republic of China and the United States, and would tend to encourage similar defections among official Chinese Government personnel sent here at the expense of the Chinese Government for special training courses (R. 360). The application for adjustment of status was denied on March 7, 1963 (R. 243, 343–345).

Petitioner was granted until April 7, 1963, to depart voluntarily from the United States. He did not leave. On April 16, 1963, an Order to Show Cause in deportation proceedings was issued charging that the petitioner was subject to deportation in that, after admission as a nonimmigrant, he remained in the United States for a longer time than permitted (R. 242, 343). Petitioner conceded deportability at hearing and reapplied for adjustment of status to that of a permanent resident under Section 245 of the Immigration and Nationality Act (R. 243, 346). On September 26, 1963, the hearing officer, in the exercise of his discretion, denied petitioner's application for Section 245 relief. He granted petitioner voluntary departure in lieu of deportation, with the proviso that, if petitioner failed to depart, he would be deported to Taiwan on the charge contained in the Order to Show Cause (R. 220, 225). On April 24, 1969, the

Board of Immigration Appeals dismissed petitioner's appeal (R. 195–202).

On June 6, 1964, a deportation warrant was issued.[1] On June 9, 1964, petitioner moved the Board to reopen the proceedings to allow him to apply for relief under Section 243(h) of the Act, 8 U.S.C. 1253(h), on the ground that deportation to Taiwan would subject him to physical persecution (R. 181). The motion was denied on July 13, 1964 (R. 171–174).

On April 30, 1966, petitioner filed a motion to reopen the proceedings to apply for suspension of deportation under Section 244(a)(1) of the Act, 8 U.S.C. 1254(a)(1), and for withholding of deportation on the ground of persecution under Section 243(h) of the Act, as amended October 3, 1965, 79 Stat. 918[2] (R. 98). The Board denied the motion on October 26, 1966 (R. 66–70).

On July 10, 1967, petitioner married an American citizen. On November 1, 1967, he filed a motion to reopen the proceedings to permit another application for adjustment of status to permanent resident under Section 245 of the Act, on the ground that a visa petition submitted on his behalf by his citizen wife had been approved (R. 58–59). This motion was granted by the Board on February 8, 1968 (R. 49–51).

On March 13, 1968, the reopened hearing commenced before the Special Inquiry Officer. On July 8, 1968,

---

[1] The petitioner was able to remain in this country subsequent to issuance of the deportation warrant by reason of the introduction of a succession of private relief bills in Congress.

[2] The Amendment of October 1965 substituted "persecution on account of race, religion, or political opinion" for "physical persecution."

the hearing officer denied the application for adjustment of status[3] but granted petitioner voluntary departure in lieu of deportation on or before August 4, 1968 (R. 13–17). On October 31, 1968, the Board of Immigration Appeals dismissed his appeal (R. 1–6). The court of appeals affirmed (Pet. App. A).

ARGUMENT

Petitioner's sole contention is that the Special Inquiry Officer and the Board of Immigration Appeals abused their discretion in denying petitioner's application for adjustment of status under Section 245 of the Immigration and Nationality Act (Pet. 5–10).[4] This contention is without merit.

Section 245 of the Immigration and Nationality Act (8 U.S.C. 1255) provides that the "status of an alien, other than an alien crewman, who has been inspected and admitted or paroled into the United States may be adjusted by the Attorney General, *in his discretion*

[3] In this proceeding, the Department of State, by letter, expressed the same view concerning the adverse impact on relations with China if adjustment of status were granted petitioner that it had expressed with regard to the November 1962 application (See R. 46; *supra* p. 4).

[4] Petitioner erroneously states that the Board "concedes that petitioner is statutorily eligible" for adjustment of status (Pet. 6). The Board stated that "Assuming that he is statutorily eligible, his case is not a meritorious one with outstanding equities which would warrant the granting of discretionary relief." (Pet. App., p. ix; R. 3). The record would amply support a finding that petitioner is not statutorily eligible for adjustment of status because of the fraud against his own government and/or false testimony in the immigration proceedings (see opinion of Board of Immigration Appeals, Pet. App., pp. vi–xiii; R. 1–6). See Section 212(a)(9), (19) of the Act, 8 U.S.C. 1182(a)(9), (19).

and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence" (emphasis added). Adjustment of status is extraordinary relief, granted only in deserving cases. The burden of proof is upon the applicant to establish not only that he meets all of the statutory requirements for eligibility but also that he is worthy of the exercise of discretion in his favor. *Chen* v. *Foley,* 385 F. 2d 929 (C.A. 6); *Santos* v. *Immigration and Naturalization Service,* 375 F. 2d 262 (C.A. 9); *Kassab* v. *Immigration and Naturalization Service,* 364 F. 2d 806 (C.A. 6); see 8 C.F.R. 242.17(d). A determination by the Attorney General to deny relief as a matter of discretion would be an abuse of discretion only "if it were made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis, such as an invidious discrimination against a particular race or group." *Muskardin* v. *Immigration and Naturalization Service,* 415 F. 2d 865, 867 (C.A. 2); *Hank* v. *Immigration and Naturalization Service,* 360 F. 2d 715, 719 (C.A. 2). It is well settled that a court will not substitute its judgment for that of the administrative officials and will set aside decisions involving exercise of discretion only on a showing of clear abuse. *Polites* v. *Sahli,* 302 F. 2d 449, 451 (C.A. 6), certiorari denied, 371 U.S. 916.

There was no abuse of discretion here. Petitioner's stay in the United States from 1957 until his deportation hearing was a fraud on his own country, involving substantial amounts of money and periodic false representations to extend his stay. It was also a fraud against the laws of this country, since he was in violation of his nonimmigrant status after accepting em-

ployment here. In the course of the many immigration proceedings, petitioner has given false, contradictory and evasive testimony (See Pet. App., pp. ix–x). Moreover, petitioner's conduct has put the United States in an embarassing situation threatening good relations with his government.[5] Contrary to petitioner's suggestion (Pet. 7–8), his fraudulent conduct cannot remotely be characterized as "political behavior." As the Court of Appeals stated, "[s]uffice it to say that [the facts in the record] afford such justification for the challenged decision that it would be highly improper for us to hold that the broad discretion vested in the Board has been abused." (Pet. App., p. iv.)

CONCLUSION

It is therefore respectfully submitted that the petition for writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

JEROME M. FEIT,
CONSTANCE S. ROTAN,
Attorneys.

DECEMBER 1969.

[5] The correspondence regarding the effect of petitioner's actions on relations with the Republic of China and the State Department views on the matter are relevant and admissible as bearing on the appropriateness of a favorable exercise of discretion. See *Hosseinmardi* v. *Immigration and Naturalization Service*, 405 F. 2d 25 (C.A. 9); *Sheng* v. *Immigration and Naturalization Service*, 400 F. 2d 678 (C.A. 9), certiorari denied, 393 U.S. 1054; *Asghari* v. *Immigration and Naturalization Service*, 396 F. 2d 391 (C.A. 9). The Board decision shows that this material was only one of many factors considered by the Board (Pet. App., pp. ix–xi).

U.S. GOVERNMENT PRINTING OFFICE: 1969